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Nos. 07-1123, 07-1168, 07-1172, 07-1173, 07-1174, 07-1177, 07-1178, 07-1179
(consolidated)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

INTERCOLLEGIATE BROADCASTING SYSTEM, et al.
Appellants,

v.

COPYRIGHT ROYALTY BOARD,
Appellee,

SOUNDEXCHANGE, INC. and NATIONAL ASSOCIATION OF
BROADCASTERS,
Intervenors.

**APPEAL FROM THE DETERMINATION OF
THE COPYRIGHT ROYALTY BOARD**

FINAL JOINT REPLY BRIEF FOR NONCOMMERCIAL BROADCASTERS

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GLOSSARY

2002_CARP_Report	The report of the Copyright Arbitration Royalty Panel in the 2001-2002 proceeding to set rates under the section 112 and 114 statutory licenses for eligible nonsubscription and new subscription services for the term October 28, 1998 through December 31, 2004, found at Report of the Copyright Arbitration Royalty Panel, Docket No. 2000-9 CARP DTRA 1& 2 (Feb. 20, 2002) (J.A. 514).
ATH, or Aggregate Tuning Hours	As set forth in 37 C.F.R. §380.2, the total hours of programming that a licensee has transmitted during the relevant period to all listeners within the United States from all channels and stations that provide audio programming consisting, in whole or in part, of eligible nonsubscription transmissions or noninteractive digital audio transmissions as part of a new subscription service, less the actual running time of any sound recordings for which the Licensee has obtained direct licenses apart from 17 U.S.C. §114(d)(2) or which do not require a license under United States copyright law. By way of example, one ATH represents one hour of programming transmitted to one listener.
APA	The Administrative Procedure Act, as set forth in scattered sections of Title 5 of the United States Code.
Appellees	A collective designation for the Copyright Royalty Board and SoundExchange, Inc. (although technically SoundExchange is an intervenor here).
Board	The Copyright Royalty Board, the body consisting of the three Copyright Royalty Judges authorized by Congress in 17 U.S.C. §801 to perform a variety of functions, including setting rates and terms under various statutory licenses. The Board is appointed by the Librarian of Congress and is the entity that issued the Determination.

CARP	A Copyright Arbitration Royalty Panel, the predecessor bodies to the Copyright Royalty Board. CARPs were <i>ad hoc</i> panels of arbitrators charged with setting royalty rates for the statutory licenses now entrusted to the Board, and their determinations were subject to review by the Librarian of Congress.
CBI	Collegiate Broadcasters, Inc., a group of college-affiliated noncommercial radio stations that participated in the proceeding below and is an Appellant here and one of the authors of this brief.
CRB_Br.	Proof Brief for the Copyright Royalty Board, filed in this Court on May 23, 2008.
Determination	The final determination in this proceeding made by the Copyright Royalty Board setting rates and terms for the sections 112 and 114 statutory licenses for public performances and ephemeral reproductions of sound recordings by eligible nonsubscription and new subscription services. The Determination was published at 72 Fed. Reg. 24,084 (May 1, 2007) (J.A. 71) and amended at 72 Fed. Reg. 29,886 (May 30, 2007) (J.A. 901) and is the subject of review in this case. The rates were codified at 37 C.F.R. §380.3.
IBS	The Intercollegiate Broadcasting System, a nonprofit tax-exempt membership organization of noncommercial, educationally affiliated stations. IBS participated in the proceeding below and is an Appellant here and one of the authors of this brief.
Interactive Service	A service that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient, as defined in 17 U.S.C. §114(j)(7).
Joint_Noncomm_PFF	Joint Noncommercial Proposed Findings of Fact, Submitted by National Public Radio, Inc., Corporation for Public Broadcasting-Qualified Stations, the National Religious Broadcasters Noncommercial Music License Committee, and Collegiate Broadcasters, Inc. in the proceeding below on December 12, 2006 (J.A. 2,482).

Noncommercial Service, or Noncommercial Webcaster	As set forth in 37 C.F.R. §380.2(h), a licensee that makes eligible digital audio transmissions and (a) is exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501); (b) has applied in good faith and based on commercially reasonable grounds to the Internal Revenue Service for such exemption; or (c) is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes.
Noncommercial Broadcasters	Noncommercial terrestrial radio broadcaster representatives participating in this proceeding – namely: CBI, IBS, WHRB, NPR, and the NRBNMLC.
Noncomm. _Br.	Joint Opening Brief for Noncommercial Broadcasters, filed in this Court on March 10, 2008.
Noninteractive Service	A service that does not meet the definition of Interactive Service set forth in 17 U.S.C. §114(j)(7).
NPR	National Public Radio, Inc., a producer and distributor of noncommercial news, talk, and entertainment programming that serves audiences in partnership with independently owned and operated noncommercial stations. NPR, including its member stations and Corporation for Public Broadcasting-qualified public radio stations (collectively, “public radio stations”), participated in the proceeding below and is an Appellant here and an author of this Brief.
NPR Agreement, or SERV-D-X_157	The agreement between NPR and SoundExchange for statutory licenses under sections 112 and 114 for the term October 28, 1998 to December 31, 2004, dated November 13, 2001 and admitted into the record as SERV-D-X_157 (J.A._3,035).
NPR_Agreement_Order	Order Denying SoundExchange’s Motion to Strike the SDARS Agreement and NPR Agreement and Evidence Regarding Them from the Record, issued by the Copyright Royalty Board during the proceedings below on June 27, 2006 (J.A._411).

NPR Survey, or SX_Trial_Ex._67	A 2004 NPR "Music Webcasting Report," admitted as a SoundExchange trial exhibit in the proceeding below (J.A. _2,887).
NRBNMLC	The National Religious Broadcasters Noncommercial Music License Committee, a committee that represents the interests of religious and other mixed-format noncommercial radio stations in music licensing matters. The NRBNMLC was a participant in the proceeding below and is an Appellant here and one of the authors of this brief.
PCL	Proposed Conclusions of Law of the identified party or parties filed in the proceeding below.
PFF	Proposed Findings of Fact of the identified party or parties filed in the proceeding below.
Rehearing_Order	Order Denying Motions for Rehearing issued by the Copyright Royalty Judges during the proceedings below on April 16, 2007. (J.A. _896)
RPFF	Reply Proposed Findings of Fact of the identified party or parties filed in the proceeding below.
Section 114 Statutory License	The statutory license under section 114 of the Copyright Act for the public performance of sound recordings via digital audio transmission by certain types of services.
SoundExchange, or SX	SoundExchange, Inc., the collective, formerly a division of the Recording Industry Association of America, representing copyright owners and performing artists in the administration of the statutory licenses at issue here. SoundExchange was a participant below and is an intervenor here.
Streaming	The activity of transmitting audio content over the Internet.
SWSA	The Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, which offered noncommercial and other small webcasters alternative rates to those set in <i>Webcaster_I</i> .
SX_Br.	Brief of Intervenor SoundExchange, Inc., filed in this Court on June 12, 2008.

Tr.	A citation from the transcript of the hearings below, identified by date as well as page and line number.
<i>Webcaster_I</i>	The opinion of the Librarian of Congress reviewing the 2002 CARP Report, found at Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule, 67 Fed. Reg. 45,239 (July 8, 2002) (J.A._902).
WHRB	Harvard Radio Broadcasting Company, Inc., a Massachusetts eleemosynary corporation, that holds the license from the Federal Communications Commission for Station WHRB (FM) and is staffed by undergraduate students at Harvard College. WHRB participated in the proceeding below and is one of the Appellants here and authors of this brief.
WDT	Written Direct Testimony of the identified witness, submitted during the direct phase of the proceeding below.

SUMMARY OF ARGUMENT

Noncommercial Broadcasters' Opening Brief demonstrated that the Determination cannot stand on its own reasoning. The Board and SoundExchange ("Appellees") respond with impermissible post-hoc rationalizations found nowhere in the Determination. They blame Noncommercial Broadcasters for not presenting evidence to refute theories not advanced by any participant, but invented by the Board in the Determination, and reverse the burden of proof by asserting particular parts of the Determination are correct simply because they have not been proven incorrect. Ultimately, they fail to identify substantial evidence or present a reasoned explanation for the Determination.

Conversely, the Board wrongly argues that its own position need *not* be supported by substantial evidence, but need only fall within a "zone of reasonableness." Appellees justify rejection of the NPR Agreement with trifling arguments contradicted by the Board's own interpretation of the Copyright Act and its treatment of other evidence. They identify no evidence to support the Board's mistaken assumption that SoundExchange's administrative costs are \$500 per station – the basis for the Board's minimum fee determination. They essentially concede that the noncommercial listenership cap depends on academic theories, not actual evidence of market transactions. And they provide no response to the detriment Noncommercial Broadcasters suffer from the Board's inaction in setting

separate recordkeeping terms or their relevance to the willing-buyer/willing-seller standard.

Appellees have no answer to Noncommercial Broadcasters' arguments that:

- noncommercial services are a "different type" of service necessitating separate rates;
- there is no evidence that noncommercial services would agree to anything but a flat fee;
- the NPR Agreement meets the Board's own criteria for an ideal benchmark, involving the same buyer, seller, right, and activity as the target;
- even adjusting for Appellees' criticisms, the NPR Agreement discredits the Board's \$500 minimum fee; and
- the proponent of the interactive services benchmark disclaimed its applicability to even the largest noncommercial stations.

ARGUMENT

I. "ZONE OF REASONABLENESS" DOES NOT EXCUSE NONCOMPLIANCE WITH THE APA.

The Board claims discretion to set a rate within a "zone of reasonableness." CRB_Br. 24-25. But "zone of reasonableness" is not a magical mantra that makes the APA disappear. Even in ratemaking, determinations must meet each APA requirement. *E.g., NAB v. Copyright Royalty Tribunal*, 675 F.2d 367, 374 (D.C. Cir. 1982) (Tribunal cannot act "with unbridled discretion;" its determinations "must be neither arbitrary nor capricious, and must be supported by substantial evidence"); *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1490,

1499, 1501, 1511 (D.C. Cir. 1984) (requiring “searching and careful inquiry” to ensure agency “examined the relevant data and articulated a reasoned explanation for its action including a rational connection between the facts found and the choice made” (internal quotes omitted)); *W. Resources, Inc. v. FERC*, 9 F.3d 1568, 1572 (D.C. Cir. 1993) (same). Indeed, this Court has overturned agency determinations *within* a zone of reasonableness if the point picked was not adequately justified. *N.C. Util. Comm’n v. FERC*, 42 F.3d 659, 661 (D.C. Cir. 1994); *Tenn. Gas Pipeline Co. v. FERC*, 926 F.2d 1206, 1209, 1213 (D.C. Cir. 1991).

The Board also relies on its asserted expertise. CRB_Br. 22. But “expertise cannot be used as a cloak for fiat judgments.” *Tenn. Gas Pipeline*, 926 F.2d at 1211. Courts still “must ascertain that the [agency’s] order is supported by substantial evidence and reached by reasoned decisionmaking.” *ANR Pipeline Co. v. FERC*, 771 F.2d 507, 516, 518 (D.C. Cir. 1985).

The Board misplaces reliance on *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951). CRB_Br. 25, 37. This Court has relegated *Montana-Dakota* to a bygone era, when courts “treated administrative policy decisions with great deference, confining judicial attention primarily to matters of procedure.” *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 597 & n.48 (D.C. Cir. 1971). Courts increasingly have

reversed agencies because “an impermissible factor had entered into the decision, or a crucial factor had not been considered,” requiring “that administrators articulate the factors on which they base their decisions.” *Id.*

The Board’s noncommercial rate neither satisfies the APA nor falls within any zone of reasonableness.

II. THE BOARD’S BRIEF CONFIRMS THE NPR AGREEMENT’S VALIDITY AS A BENCHMARK; APPELLEES HAVE NOT SUPPORTED ITS REJECTION.

A. The NPR Agreement Is Precisely The Type Of Agreement On Which The Board Argues It Should Rely.

The Board cites the last sentence in section 114(f)(2)(B) five times to justify basing its Determination on commercial interactive service agreements. CRB_Br. 10, 29, 33, 47, 48. That sentence reads: “In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements *described in subparagraph (A)*.” But the first three times, the Board quotes only *part* of the sentence, eliding the italicized fundamental limitation. The fourth time (*id.* 47-48), it misinterprets the limitation, missing its full significance.

The Board contends that “agreements described in subparagraph (A)” are sound-recording licenses, and that, “if anything,” that limitation “requires the Judges” to consider only sound-recording agreements. *Id.* 48. But subparagraph

(A) describes a specific type of sound-recording license: a voluntary license agreement for “public performances of sound recordings by means of eligible nonsubscription transmission services and new subscription services specified by subsection (d)(2).” 17 U.S.C. §114(f)(2)(A). Subsection (d)(2), in turn, identifies only transmissions and services *eligible for the 114(f) statutory license*. *Id.* §114(d)(2). The provision is logical: the best benchmarks involve the same non-interactive, non-subscription services – not radically different services and buyers.

The NPR Agreement is just such a voluntary license agreement for nonsubscription transmissions eligible for the 114(f)(2) statutory license. Interactive service agreements (upon which the Board relied) are not. *Id.* §114(d)(2)(A)(i) (excluding interactive services).

Further, the Board’s repeated claim that “[t]he Judges selected as a benchmark the only voluntarily negotiated license agreements in the record that involved both webcasting and sound-recording rights” is false. CRB_Br. 32-33, 46-47. The NPR Agreement involves sound-recording rights and more relevant noninteractive webcasting. It is the *only* benchmark in the record that complies with the statute the Board invokes.

B. Appellees' Post-Hoc Reliance On The NPR Agreement's Non-Precedential Clause Contradicts The Board's Prior Actions And Deserves No Weight.

Appellees defend the Board's rejection of the NPR Agreement benchmark, citing a provision in the Agreement prohibiting the signatories from using it in rate-setting proceedings. CRB_Br. 65-66; SX_Br. 47. The Board, however, did not advance this rationale in the Determination; it may not now be considered as a basis for upholding it. *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943) ("[T]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 168-69 (1962) (agency's decision will be "upheld, if at all, on the same basis articulated in the order by the agency itself"); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).¹

Counsel's post-hoc argument contradicts the Board's conclusion, after full briefing, that the clause did not vitiate the Agreement's precedential value. The Board rejected SoundExchange's arguments, citing several ratemaking decisions to find that despite its nonprecedential clause, the NPR Agreement is "a presumptively helpful guide to the reasonable value of the license for which a fee is being sought." *NPR_Agreement_Order*, 1 (quoting *U.S. v. ASCAP*, No. 41-

¹ Appellees argue that because only the NRBNMLC advanced the NPR Agreement benchmark, the other Noncommercial Broadcasters waived reliance on it. CRB_Br. 65-66; SX_Br. 47. This post-hoc argument is wrong. The NRBNMLC's proposal applied universally and was properly presented to the Board. See *Cellnet Commc'n Inc. v. FCC*, 965 F.2d 1106, 1109 (D.C. Cir. 1992) ("Consideration of the issue by the agency at the behest of another party is enough to preserve it.").

CIV.13-95, 1999 WL 335376, at *5 (S.D.N.Y. May 26, 1999)) (J.A._411).

Moreover, the Board expressly relied upon it to support its Determination in multiple respects. Determination 24,091 (noncommercial flat fee), 24,097 (noncommercial rates generally lower than commercial rates), 24,099 (typical NPR station should not be treated like commercial station) (J.A._79, 85, 87). It treated the Agreement as valid precedent.²

SoundExchange's argument that the CARP "ordered" the NPR Agreement, SX_Br. 47, is another post-hoc rationalization and deserves no weight. SoundExchange's suggested support is a comment from closing argument (not evidence) that the CARP asked the parties "to try to work something out," 12/21/06_Tr._124:13-17 (J.A._840), and the NPR Agreement itself, which merely says "the Parties have entered into this Agreement at the request of members of the [CARP]." SERV-D-X_157, SX0085154 (J.A._3,035). There is no evidence of coercion or unwillingness by either side.

C. Appellees' Additional Arguments Against The NPR Agreement Lack Merit.

Appellees again obfuscate the number of stations the NPR Agreement covered. CRB_Br. 66 (Agreement "covered 410 stations" with "no indication" of

² Board counsel finds it "particularly telling" that NPR did not rely on the Agreement below or here. CRB_Br. 65. Such a statement is disingenuous, as contractual obligations prevented NPR from proffering it. Further, Appellees' claims that NPR admits that it competes with commercial services are untrue.

how “additional stations... were to be handled”); SX_Br. 47-48 (no evidence “as to how many stations were streaming in any given year from 1998-2004”). They are wrong: it clearly covered over 798 NPR and CPB-qualified stations, over 600 of which were streaming as of 2004. Noncomm._Br. 19-20. Moreover, the precise number is irrelevant; the Board admits that at least 410 stations were covered, CRB_Br. 66, which provides a per-station per-year upper bound of [[]], demonstrating the absurdity of the Board’s \$500 minimum. Noncomm._Br. Part III.A.1.c.

The Board argues there was no evidence “that the parties valued each year of the license equally,” CRB_Br. 66, but there was no evidence they did not. Moreover, the highest aggregate fee the Agreement supports for its entire term (assuming only 410 stations) would be [[]] for *six years*, confirming the arbitrariness of the Board’s \$500 annual fee.

The Board justifies rejecting the benchmark because it was not adjusted for the time value of money, CRB_Br. 67, but this criticism contradicts the Board’s reliance on similarly imperfect evidence elsewhere. It made no upward adjustment to the number it plucked from a years-old NPR survey for its listenership cap and explicitly rejected SoundExchange’s proposed inflation adjustment. Determination 24,096 & n.34 (J.A._84). If the Board’s reliance on those figures without any

time-value adjustment was proper, it was improper and arbitrary to reject the NPR Agreement for that reason.

Moreover, Noncommercial Broadcasters demonstrated the straightforward adjustment, if warranted. Noncomm._Br. 20-21. The Board's contention – "it was not the Judges' obligation to cure the defects in Appellants' proposals," CRB_Br. 67 – misses the point. Rejecting the most directly applicable benchmark because of a mathematical adjustment – particularly considering the Board's willingness unilaterally to adjust SoundExchange's proposal³ – was arbitrary. Agencies cannot "treat[] type A cases differently from similarly situated type B cases." *Indep. Petroleum Ass'n v. Babbitt*, 92 F.3d 1248, 1260 (D.C. Cir. 1996).

III. APPELLEES' BRIEFS CONFIRM THE ARBITRARINESS OF THE \$500-PER-CHANNEL MINIMUM FEE.

A. Appellees Identify No Evidence That SoundExchange's Per-Channel Administrative Costs Are \$500.

The Board concluded a \$500 minimum fee was necessary to cover SoundExchange's administrative costs. Determination 24,096, 24,099 (J.A._84, 87); Noncomm._Br. Part III.B; *accord* CRB_Br. 42. Yet Appellees identify no evidence of SoundExchange's administrative costs. CRB_Br. 68-69; SX_Br. 33-35, 44. Although SoundExchange claims it performed certain types of work to

³ Rather than reject SoundExchange's proposal, which incorporated a three-part metric and included elements related to wireless access, inflation, and bundled services, the Board adjusted it. Determination 24,096 & nn.34-36 (J.A._84). Nor did the Board adjust for the "warts" it found in the interactive services benchmark undermining its reliability. *Id.* 24,094 (J.A._82).

administer the license, SX_Br. 34, mere claims without quantification cannot support the Board's \$500 amount. *See Ala. Power Co. v. FERC*, 220 F.3d 595, 599 (D.C. Cir. 2000) (requiring "substantial evidence in the record" to support agency decision).

By the Board's own reasoning, Appellees' failure to quantify the alleged administrative costs is fatal. Determination 24,095 & n.30 (rejecting evidence of promotional effect of simulcasting due to lack of "acceptable empirical basis for quantifying" it) (J.A._83). Application of a different standard here is arbitrary.

B. Noncommercial Broadcasters Were Not Obligated To Refute Unasserted Arguments.

The Board faults Noncommercial Broadcasters for not offering evidence that SoundExchange's administrative costs are *not* \$500 per channel. CRB_Br. 68-69. But rational decisionmaking requires more than an absence of contrary evidence; it requires substantial evidence to support the decision. *Supra* Part I.

Moreover, the Board repeatedly argues that where specific assertions were not made below, they cannot sustain the determination. CRB_Br. 60-61, 66. SoundExchange never based its minimum-fee proposal on administrative costs, so that claim cannot uphold the Determination. Litigants cannot be expected to challenge theories first presented in the Determination and not advanced by any participant. Noncommercial Broadcasters had no reason to present "contrary" evidence of unasserted administrative costs.

Even the NPR Agreement's highest possible per-station rate shows that, assuming SoundExchange would not agree to royalties not covering its costs, annual per-station administrative costs are, at most, []]. Noncomm._Br. 23. "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight," *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951), but Appellees do not consider this contrary evidence.

C. Appellees' New Arguments Do Not Support The \$500 Minimum Fee.

Appellees' counsel advances various post-hoc rationalizations purporting to show the fee's reasonableness without explaining their relevance to the Determination's stated reasoning. CRB_Br. 69; SX_Br. 33, 44. These are entitled to no weight, *supra* Part II.B, and they do not support the Board's \$500 fee.

Appellees recite the \$500 noncommercial minimum fee from *Webcaster I*. SX_Br. 44; CRB_Br. 69. But SoundExchange's own records show it was too high for noncommercial buyers: nearly all noncommercial services rejected that fee and paid lower royalties under SWSA. Joint_Noncomm._PFF ¶¶78-81 (J.A. 2,524-25). Commercial interactive agreements' larger minimum fees, CRB_Br. 69; SX_Br. 33, involve a wholly different "type" of service and say nothing about what noncommercial buyers would pay. *Supra* Part II.A. As to the 2003 commercial carry-forward agreement, the Determination recognized (at 24,097 & n.38 (J.A. 85)) that it was made exclusively with *commercial* services – a different

type of service.⁴ Moreover, Appellees do not show how \$500 would be appropriate for noncommercial services with concededly minimal music listenership. SX_Br. 45.

Appellees cite IBS/WHRB's original rate proposal. CRB_Br. 69; SX_Br. 44. But a rate proposal (let alone a *discarded* one) is not evidence that can justify rates. Further, Appellees mischaracterize the proposal. It included *two* minimum fees: for up to five channels, many noncommercial services would pay only \$250 and others would pay \$500. Kass_WDT, Att. A, §263.4 (J.A._139-44).

The Board's comparison to the noncommercial discount in *Webcaster_I* is illusory and incorrect. CRB_Br. 64. Virtually no service paid the noncommercial CARP rates. Joint_Noncomm._PFF ¶78-81 (J.A._2,524-25). Moreover, the CRB "discount" is actually *lower* than the CARP "discount" for noncommercial services (assuming 12 performances/ATH) streaming over 219,324 monthly ATH in 2008 (only 37.8% over the cap).⁵ Services streaming under 2,480 monthly ATH would receive no discount at all under either rate.

⁴ The Determination mentioned the *Webcaster_I* noncommercial minimum fee (at 24,099 (J.A._87)) to argue that SoundExchange's administrative costs were the same for commercial and noncommercial stations, not to show that they *were* \$500. The 2003 carry-forward agreement was mentioned (at 24,097 & n.38 (J.A._85)) only to show that SoundExchange's administrative costs *did not exceed* \$500 per station.

⁵ $x=219,324$ in $.0002176/.0007616=((500/12)+(.0014*12)*(x-159,140))/(.0014*12x)$.

**IV. APPELLEES CANNOT SUPPORT THE BOARD'S
NONCOMMERCIAL FEE STRUCTURE, ITS LIMIT ON THE FLAT
FEE, OR THE ABOVE-LIMIT RATE.**

Appellees' briefs confirm that the Board's convergence theory underlying its noncommercial rates is wrong in both theory and fact.

**A. The Board's Derived-Demand Convergence Theory Is
Inapplicable To Noncommercial Services.**

The Board defends its convergence theory with the alleged economic "principle" that "if the good in question derives its demand from its ultimate use, market segmentation can persist only when users cannot easily transfer the good between ultimate uses," CRB_Br. 71. It claims Noncommercial Broadcasters "do not dispute" this principle. *Id.* But the premise underlying the contention that *noncommercial* services derive sound recording demand from customer demand for their services was not only refuted by Noncommercial Broadcasters but disavowed by SoundExchange's economist.

Noncommercial Broadcasters demonstrated that they "do *not* seek to maximize revenue by increasing listenership" and that their donors "do *not* base their funding on audience size." Noncomm._Br. 27 (emphasis added). Moreover, increased listeners do not necessarily lead to increased funds – listeners do not pay to listen, and Noncommercial Broadcasters overwhelmingly receive no advertising revenues. *Id.* 6. Thus, such services' demand for sound recordings is not directly

linked to consumer demand, as they do *not* act primarily to maximize listeners but to fulfill a nonprofit educational or religious mission. *Id.* 5-7.

Even SoundExchange's chief proponent of the derived-demand theory, Dr. Pelcovits (Pelcovits_WDT 10, 35 (J.A._984, 1,009)), disavowed the applicability of his economic model to noncommercial services. Noncomm._Br. 8. A core assumption of his analysis was that "both the willing buyer and willing seller in this hypothetical marketplace are commercial entities fully motivated to maximize profits." Pelcovits_WDT 5 (J.A._979). He flatly disclaimed any attempt to set rates for noncommercial willing buyers "not seeking to maximize profit." *Id.* 6 (J.A._980).

Where, as here, Noncommercial Broadcasters' demand for sound-recording licenses is *not* dependent on consumer demand, their willingness to pay for sound recordings will not depend on consumer demand. Thus, the Board's convergence theory is profoundly flawed.

B. The Board's Defense Of Its Convergence Theory Vaunts Unsubstantiated Speculation Over Evidence.

Even if the convergence theory were sound, the Board fails to support it with any evidence that noncommercial services actually "cannibalize" listeners from commercial webcasters. Instead, it relies on speculation by a SoundExchange economist who consistently characterized cannibalization as a "risk," not a reality. Noncomm._Br. 33-34. While the APA requires the Board to support its decision

with substantial evidence, the Board focuses instead on what it elsewhere called “the theoretical speculations of an academic.” Determination 24,093 (J.A._81).

The only actual evidence the Board cites supports Noncommercial Broadcasters. The Board found it “significant” that, under the NPR Agreement, “typical NPR stations” paid less than commercial stations and, thus, had not converged with commercial stations and deserved a lower rate – the marketplace clearly showed they paid much lower fees. Determination 24,099 (J.A._87). Of course, these lower rates applied even to the large NPR stations that the Board treats differently. Serv._Ex._157 §1.6 (J.A._3,036). By the Board’s own reasoning, the evidence shows that the market has *not* converged, even for the biggest noncommercial stations.

Appellees similarly misinterpret Noncommercial Broadcasters’ discussion of large NPR stations. CRB_Br. 73. By basing its convergence theory almost entirely on a handful of NPR stations, the Board faces direct evidence of marketplace rates. The NPR Agreement is indisputable evidence of the rates SoundExchange would seek in a willing-buyer/willing-seller transaction.⁶

⁶ Noncommercial Broadcasters already refuted other conclusions repeated by the Board. *Compare* CRB_Br. 72-73 *with* Noncomm._Br. 30-33.

C. The Board Fails To Support Its Listenership Cap With Evidence But Blames Noncommercial Broadcasters For Not Refuting An Argument Nobody Made.

Even if “convergence” were valid in theory and fact, the Board’s brief fails to justify using listenership to define it. Instead of affirmatively defending this choice with evidence or arguments, it points to Noncommercial Broadcasters’ alleged failure to identify a better metric. CRB_Br. 73.⁷ But it is the Board – not Noncommercial Broadcasters – who must support its decision with substantial evidence, which it failed to do.⁸ This is particularly true where (a) there was no chance to present contrary evidence because no party proposed a noncommercial cap and (b) Appellees have not even established that convergence occurs. Besides, Noncommercial Broadcasters *did* offer a better alternative – actual marketplace evidence that SoundExchange would offer noncommercial webcasters of all listenership levels – a flat fee with *no* convergence cap.

The Board argues that because the number it chose as the listenership cap was derived from numbers in the record, it “falls within a permissible zone of reasonableness.” CRB_Br. 74. But the Board does not show the range of any zone, or even that its figure was within that zone. Instead, it simply recounts how

⁷ The Board’s claim that Noncommercial Broadcasters conceded convergence (CRB_Br. 73) is fantasy. Noncommercial Broadcasters quoted the Determination to refute it. Noncomm._Br. 30.

⁸ The Board’s choice of listenership also fails because it treats listening to non-sound-recording content, like sports, as equal to sound-recording listening.

it made its calculation, and claims, without discussion, that this number was “a reasonable proxy for” the convergence point. *Id.* 74-75.

Finally, the Board’s reliance on the NPR Survey is misplaced. While Appellees fault Noncommercial Broadcasters for citing a 79% non-response rate for reporting ATH in the NPR survey, CRB_Br. 74 & n.21; SX_Br. 46, that is, in fact, the correct percentage of NPR stations unable to provide *actual* ATH data. The Board instead relied on an indirect measure, average simultaneous connections. Only 52% responded at all, and, based on the rounded answers, most were apparently guessing. SX_Tr._Ex_67, CRB-NPR000054-57 (J.A. _2,912-15). Thus, the Board used a proxy for ATH, which, in turn, was a proxy for competition and convergence, which, in turn, was a proxy for the willing-buyer/willing-seller standard. Rather than look to the NPR Agreement for real willing-buyer/willing-seller rates, the Board arbitrarily chose flawed theoretical abstractions, making three different leaps without evidentiary support.⁹

D. The Board Fails To Support Imposition Of Commercial Usage Fees On Noncommercial Stations Above The Listenership Cap.

Appellees offer no response to Noncommercial Broadcasters’ demonstration that application of a rate derived from the commercial interactive services benchmark to any noncommercial station is inappropriate. *See* Noncomm._Br. 34-

⁹ Nothing in the record establishes the survey’s reliability for the purposes for which the Board used it. *NRDC, Inc. v. EPA*, 902 F.2d 962, 968-69 (D.C. Cir. 1990) (requiring agency to use reliable evidence to draw reasonable conclusions), *vacated on other grounds*, 921 F.2d 326 (D.C. Cir. 1991).

36. They do not dispute that no evidence shows a difference between high-listenership and low-listenership noncommercial stations, or that SoundExchange's own expert testified that the interactive services benchmark cannot apply to noncommercial services. *Id.* The silence is conclusive.

V. THE BOARD FAILS TO JUSTIFY DEFERRING CONSIDERATION OF RECORDKEEPING COSTS.

The Board addresses only half the argument in contending it has unfettered discretion to defer consideration of recordkeeping and reporting requirements until some unspecified future date. The Board arbitrarily failed to assess the cost impact of recordkeeping requirements on noncommercial services and on what willing noncommercial services could and would pay SoundExchange. Noncomm_Br. 36-40.¹⁰

The Board argues that Noncommercial Broadcasters have waived this issue, CRB_Br. 86, but the issue was presented and considered below, and is properly before the Court. *Supra* Part II.B & n.1.¹¹

The Board cannot defer endlessly its promised reassessment. More than *fourteen months* since the Board's decision, nothing has occurred, while noncommercial services face Hobson's choice of paying high recordkeeping costs

¹⁰ The NRBNMLC takes no position on this issue.

¹¹ In addition to the NRBNMLC, IBS/WHRB and CBI raised the issue in their Proposed Findings. IBS/WHRB_RPFF 6 (J.A._794); CBI_PFF ¶¶20-23, 27, PCL ¶4 (J.A._756-57, 759). The issue was also timely presented in a Motion for Rehearing, which the Board denied saying it "will be addressed in a future proceeding." Rehearing_Order 3 (Apr. 16, 2007) (J.A._898).

and the baseless minimum fee, or simply shutting down. Noncomm_Br. 38. The issue of how to sequence new rules in the Determination with amending the existing regulations was properly before the Board. The Board's failure to rationally relate the two was arbitrary and capricious.¹²

Even if deferral were proper, the Board erroneously failed to consider reporting costs in its willing-buyer/willing-seller calculus. As SoundExchange concedes, many Noncommercial Broadcasters' audiences are minimal. SX_Br. 45. Reporting by these groups would have no meaningful effect on royalty allocation. Yet the Board imposed recordkeeping burdens on Noncommercial Broadcasters as if they would willingly incur the same burdens as large commercial webcasters. This was arbitrary, capricious, and an abuse of discretion.

¹² At the very least, the APA empowers the Court to rectify unreasonable agency delay. *E.g.*, *Public Citizen Health Research Group v. FDA*, 740 F.2d 21, 32-35 (D.C. Cir. 1984).

CONCLUSION

The Board's Determination should be vacated, and this Court should enter new noncommercial rates based upon the NPR Agreement.

Respectfully submitted,

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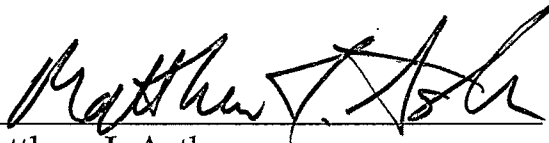
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B) and (C), D.C. Cir. R. 32(a), and this Court's briefing order of May 30, 2008, the undersigned certifies the following:

1. Exclusive of the exempted portions in Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir R. 32(a)(2), this brief contains 4,113 words.
2. This brief has been printed using a proportionally spaced, 14-point Times New Roman typeface, with footnotes in a proportionally spaced, 11-point Times New Roman typeface.


Matthew J. Astle

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Public Version of the Final Joint Reply Brief for Noncommercial Broadcasters was served on August 7, 2008 via first-class mail, with a courtesy copy via electronic mail, on the following:

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